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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/899,789	07/06/2001	Nathan L. Feldman	1295.01	3744

7590 04/28/2004

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EXAMINER

WEINSTEIN, STEVEN L

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 04/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

10/1

Office Action Summary	Application No. 09/899,789	Applicant(s) FELDMAN ET AL.	
	Examiner Steven L. Weinstein	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 February 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) 11 and 12 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-10 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Applicant's response filed February 5, 2004, traversing the election of species requirement set forth in the Office action mailed September 5, 2003 has been fully and carefully considered but is not found to be convincing. Applicant's traverse is based on the urging that it would not be a serious burden on the USPTO to examine both species. This is an opinion, not supported by any reasoning. A restriction or election by the USPTO is prima facie evidence of a serious burden and to rebut this, one must provide reasons and evidence. In fact, the two species are entirely different structures, which would require different considerations and indeed different searches. Also, the traversal appears to mix up a restriction between say different statutory classes and an election between species. An election of species only requires an assessment that, at the time the election was made, the species were considered to be patentably distinct. Applicant is also referred to page 2, paragraph 7 of the last Office action.

The election of species is therefore made FINAL.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-7, 9 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shapiro et al in view of Chen et al (4,415,598), Bryant (368,704), Kenney (3,096,905), Gerald et al (3,783,996), Brochman (3,923,198), Han (4,000,824), Loughley et al (4,183,457) and Brinton (495,012).

In regard to claim 1, Shapiro et al discloses a system for convenient dispensing of a semi-solid comestible (dough is considered a semi-solid comestible) from a hermetically sealed container (the threaded end caps and possibly even the friction fit end caps of Shapiro et al (column 3, paragraph 1) would provide an hermetic seal) wherein the system comprises a substantially unitary cylindrical sleeve formed of a substantially rigid material (column 1, paragraph 6) and wherein the sleeve has first and second ends; a first base, e.g. 14 (i.e. a cover or a lid) formed of a substantially rigid material and defined by a radial cross-section of the sleeve with the periphery of the base secured to the sleeve proximally to the first end of the axis wherein said first base can be selectively separated from the sleeve (e.g. by snap or interference fit or threaded connection—column 3, paragraph 1), a quantity of comestible disposed within the sleeve and against the first base, a wafer-like piston (16) disposed coaxially within the sleeve upon a side of the comestible opposite the first base with the piston disposed in press slidable complementally relationship to the interior walls of the sleeve and a second base, e.g. 12, formed of substantially rigid material at said second end of the sleeve, said second base defined by a radial cross-section of the sleeve, the periphery of the second base secured in communication with the sleeve proximally to the second end of the sleeve and the second base being capable of selectively separating from the sleeve and the piston being disposed closer to the second base than the first base. Claim 1 now recites that the comestible is difficult to empty from the sleeve by the use of a spoon or fork. The dough of Shapiro et al would be difficult to empty from the sleeve by the use of a spoon or fork. That is why it is dispensed by a follower or piston; to dispense a desired, uniform amount. Claim 1 also recites that the base is secured in “integral” communication. The word “integral” usually means one piece with no connections. In any case,

Shapiro et al discloses friction, snap, and threaded fits which are also disclosed by applicants.

Claim 1, also now recites that the second base is “defined by” a radial cross-section of the sleeve.

This phrasing is not clear. That is, what does it mean to be “defined by”? To the extent that the second base must be dimensioned and configured such that it is capable of being selectively separate from the sleeve, then the second base of Shapiro et al is “defined by” the radial cross-section of the sleeve. In regard to the new recitation that the piston is adjacent to the second base, the word adjacent means near and how near the piston is to the base is an obvious function of how full the sleeve is. Both applicant and Shapiro et al show the piston sitting on top of the comestible if the sleeve is oriented vertically.

Finally, claim 1 now recites that a circumferential seal is around both the first base and the first end and the second base and the second end, which enables the container to be hermetically sealed. As noted above, since Shapiro et al discloses that both separable bases may be threaded and threaded closures are notoriously well known as being hermetic seals, then the seal between the threaded portions of Shapiro et al can be fairly read as a circumferential seal around ... to be hermetically sealed. In any case, Chen et al, Bryant, Kenney, Gerald, Brochman, Han, Loughley and Brinton disclose that it was, of course, notoriously old to provide packages containing closure/container connections with circumferential seals (sealing strips, strip seals, etc.) to provide a stronger and indeed an hermetic seal. It is not clear if the container of Shapiro et al is intended to be initially sold filled or not. In any case, food including dough is, of course, generally sold packaged and hermetically sealed. See, for example, Chen et al, Bryant, Kenney etc. To modify Shapiro et al and provide hermetic circumferential seals if the container

is to be a mercantile container as taught by the art taken as a whole would therefore have been obvious.

Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of De Coster ('135) and Bateman et al ('040) for the reasons given in the Office action mailed September 5, 2003.

All of applicant's remarks filed February 5, 2004 have been fully and carefully considered but are not found to be convincing. The urgings relative to the circumferential seal are moot in view of the new ground of rejection necessitated by applicant's amendment. Applicants' urgings are directed to limitations not found in the claims. The claims are silent as to pet food. They are also silent as to scraping the bottom of a can. The claims recite a piston within a container whose disclosed function (not found in the claims) is to push the product out. This is precisely what Shapiro et al teaches. Shapiro et al teaches a container with an internal piston which is used to push the food out. Although, as fully detailed above, Shapiro et al is readable on the recited food, the particular food or, for that matter, any product one chooses to place in the container to be dispensed with a piston is seen to have been an obvious matter of choice. Although, pet food is not recited, it is noted that applicants admission of the prior art teaches that it was known that pet food was hard to dispense. The problem is dispensing, and the art taken as a whole teaches using a piston to dispense the contents of a container. On page 11 of the amendment, it is urged that Shapiro et al does not have the contiguous flat external surface of applicant's article. This urging is also directed to limitations not found in the claims. The claims are silent as to contiguous flat external surfaces. However, even if the claims were so limited, the urging would still not be convincing since as taught by Brinton, it is notoriously old to

provide flat contiguous surfaces for outer sleeves which have both a label function and a sealing function (page 1, lines 50 plus. Finally, the urging concerning the orientation of the piston relative to the food and lids is not clear. Shapiro et al, like applicant, has a container that is openable from both sides so that the piston can be pushed from one open end and push or dispense the contents out the other open end. There is no top or bottom, when both ends are openable and the piston is on one side. One could hold the container vertically and push upwardly as in a fountain effect, one could orient it sideways, and one could orient it facing downwardly. The art taken as a whole teaches, if necessary, that the container of Shapiro et al can be a mercantile container with circumferential hermetic seals.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

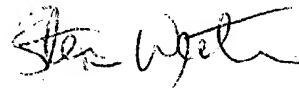
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Any inquiry concerning this communication from the examiner should be directed to Steven L. Weinstein whose telephone number is (571) 272-1410. The examiner can generally be reached on Monday-Friday from 7:00 a.m. to 3:30 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application should be directed to the receptionist whose telephone number is (571) 272-1201.

S. Weinstein/dh
March 16, 2004



STEVE WEINSTEIN
PRIMARY EXAMINER
4/26/04